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Nos. 97-826, 97-829, 97-830, 97-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,

Petitioners,

vs.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

Petitioners,

vs.

CALIFORNIA, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE MID-SIZED LOCAL EXCHANGE CARRIERS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that the plain terms of the provisions of the Telecommunications Act of 1996 ("Act") governing competition in local telephone markets leave pricing and other determinations exclusively to the state public utility commissions, which have historically made those determinations, and not to the Federal Communications Commission ("FCC")?

2. Did the Court of Appeals err in vacating an FCC rule that, as petitioners themselves acknowledge, would allow new entrants to obtain from incumbent local telephone carriers an already combined platform of network elements at cost-based prices, when the Act allows entrants to obtain only *unbundled* network elements at cost-based prices?

3. Did the Court of Appeals err in vacating the FCC's rule implementing 47 U.S.C. § 252(i) as improperly subverting the system of private negotiation established by Congress?

LIST OF PARTIES AND AFFILIATES

Aliant Communications Company is a wholly owned subsidiary of Aliant Communications Inc., a publicly traded company. It has no non-wholly owned subsidiaries.

ALLTEL Telephone Services Corporation is a wholly owned subsidiary of ALLTEL Corporation, a publicly traded company. It has no non-wholly owned subsidiaries, but does have investment interests in the following publicly traded companies: Applied Global Internet, Champaign Telephone, Conestoga Telephone, Conneaut Telephone, Horizon Telecom, Inc., SPRINT and WorldCom, Inc.

Cincinnati Bell Telephone Company is a wholly owned subsidiary of Cincinnati Bell Inc., a publicly traded company. It has no non-wholly owned subsidiaries.

The Concord Telephone Company is a wholly owned subsidiary of CT Communications, Inc., a publicly traded company. It has no non-wholly owned subsidiaries.

North State Telephone Company is a wholly owned subsidiary of North State Telecommunications Corporation, which is not a publicly traded company. It has no non-wholly owned subsidiaries.

Pacific Telecom, Inc. is a wholly owned subsidiary of Century Telephone Enterprises, Inc., a publicly traded company. Pacific Telecom, Inc. has the following non-wholly owned subsidiaries: Gem State Utilities Corporation; Northwestern Telecom Systems, Inc.; Pacific Telecom Cable, Inc.; and STU Partnership.

Rock Hill Telephone Company has no parents or non-wholly owned subsidiaries.

Roseville Telephone Company is a wholly owned subsidiary of Roseville Communications Company. With regard to non-wholly owned subsidiaries, Roseville Telephone Company holds a minority equity interest in the Sacramento Valley Limited Partnership and a majority equity interest in West Coast PCS LLC.

The Southern New England Telephone Company ("SNET") is a wholly owned subsidiary of Southern New England Telecommunications Corporation, a publicly traded company. SNET has no other parents, non-wholly owned subsidiaries or affiliates that issue stock or debt securities to the public.

The Independent Telephone & Telecommunications Alliance ("ITTA") is a non-profit trade association representing 15 mid-sized independent telephone companies providing local exchange and exchange access telephone service in 41 states. ITTA has no parent companies or subsidiaries.

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This brief in opposition to the petitions for a writ of certiorari is filed on behalf of nine telecommunications companies that are based in virtually every part of the country and a trade association. Each of the respondent companies is an incumbent local exchange carrier ("LEC"), as that term is defined in

47 U.S.C. §§ 153(26) and 251(h)(1), as added by the Telecommunications Act of 1996 ("Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996).[1] The nine companies actively participated as petitioners and intervenors in the briefing and argument before the United States Court of Appeals for the Eighth Circuit and were collectively referred to as the "Mid-Sized LECs."[2] In contrast to the "large LECs," *i.e.*, the Bell Operating Companies ("BOCs") and GTE Service Corporation ("GTE"), each of the Mid-Sized LECs individually controls fewer than two percent of the nation's telephone access lines. The Independent Telephone & Telecommunications Alliance is a non-profit trade association representing 15 mid-sized LECs providing local exchange and exchange access telephone service in 41 states. Respondents have endeavored in this brief not to repeat the arguments set forth in the briefs in opposition filed by GTE and the BOCs; the Mid-Sized LECs fully support their arguments and incorporate them by reference in this brief.

STATEMENT

The petitions are built upon three themes, each of which is essential to petitioners' arguments on the merits, as well as to their asserted reasons for granting a writ of certiorari: (1) the states have been at best slow and at worst obstructionist in the

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[1] The Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*; relevant excerpts from the Act are reproduced in the Appendix to the petition in *AT&T Corp., et al. v. Iowa Utilities Bd., et al.*, No. 97-826 ("Pet. App."). Sections 2 and 3 of the Communications Act of 1934 are codified at 47 U.S.C. §§ 152 and 153.

[2] The "Mid-Sized LECs," and their principal places of business, are as follows: Aliant Communications Co. (Lincoln, Nebraska); ALLTEL Telephone Services Corp. (Little Rock, Arkansas); Cincinnati Bell Telephone Co. (Cincinnati, Ohio); The Concord Telephone Co. (Concord, North Carolina); North State Telephone Co. (High Point, North Carolina); Pacific Telecom, Inc. (Vancouver, Washington); Rock Hill Telephone Co. (Rock Hill, South Carolina); Roseville Telephone Co. (Roseville, California); and The Southern New England Telephone Co. ("SNET") (New Haven, Connecticut).

move toward competition in local telephone markets, and state commissions are either unable or unwilling to regulate interconnection among competing local carriers in accordance with the Act; (2) all telephone carriers are virtually identical national or international giants, and all local telephone markets are uniform; therefore, "one-size-fits-all" national rules on pricing and other aspects of local competition, all determined by the Federal Communications Commission ("FCC"), are necessary to achieve Congress's goals in enacting the Act; and (3) the Eighth Circuit's decision has derailed the competition that the Act seeks to foster. None of these assertions is true. These themes that so permeate petitioners' arguments reflect the "Washington-knows-best" attitude that the 104th Congress explicitly rejected in crafting the Act.

1. Local telephone service has traditionally been provided by a single company operating in a defined territory. At present, there are over 1,000 LECs of a wide variety of sizes that provide local exchange service in the numerous local markets throughout the Nation.[3] See H.R. Rep. No. 104-204, at 49-50, *reprinted in* 1996 U.S.C.C.A.N. 10, 12-13 (1995) (the "*House Report*"). Those local markets differ dramatically in geography, demographics, infrastructures, and population densities, all of which affect the structure, cost and pricing of local service. Historically, state utility commissions have strictly regulated the price and service offerings of intrastate telephone service and imposed "universal service" obligations on the LECs serving those markets, requiring those carriers to serve their entire service areas, the densely populated as well as the remote, and all of their citizens, business and residential customers alike. By law, the FCC has no jurisdiction over local telecommunications markets; its jurisdiction is limited to

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[3] For example, the Mid-Sized LECs range in size from approximately 90,000 to 2 million access lines as of December 1, 1995, while by comparison, the BOCs and GTE range from approximately 14 to 21 million access lines. United States Telephone Ass'n, *Phone Facts* (1996) (App. A-213) (all citations to "App. A-_" are to the Appendix of the Mid-Sized LECs filed in the Eighth Circuit on Nov. 18, 1996).

interstate matters only. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372-73 (1986); 47 U.S.C. § 152(b).

Because virtually every state is served by more than one LEC, state commissions also have for decades regulated interconnection in local telephone markets. For example, 150 LECs serve Iowa alone. App. A-212. Without interconnection, a family served by one LEC in a particular town in Iowa would be unable to place a local telephone call to another family served by a different LEC in a neighboring town. Most state commissions have thus developed considerable familiarity with the technical and economic issues that arise when more than one telephone company provides service – albeit, non-overlapping service – in the same state.

Competition began developing in the 1970s in the markets for telephone equipment, information services and long-distance services. S. Rep. No. 104-23, at 2 (1995) (the "*Senate Report*"). In view of the increasing success of competition in the long-distance market, and with cable companies in particular recognizing that they were well positioned to offer local telephone service, many states began to investigate the prospects of bringing competition to the local exchange market before Congress enacted the Act. Beginning in earnest in 1993 and 1994, numerous state legislatures and regulatory commissions introduced competition in their local telephone markets, thereby setting the stage for the widespread competition in the local market that Congress sought to extend to all states in the Act. For example, as early as 1994 the Connecticut legislature had acted to open all telecommunications markets in Connecticut to competition. *See* Conn. Gen. Stat. § 16-247a *et seq*. Further, that state's principal local exchange carrier had already signed a comprehensive agreement with governmental agencies and with numerous competitors (including petitioners AT&T, MCI and MFS) governing many aspects of interconnection, network unbundling and physical collocation, leading the state utility commission to comment in approving the agreement that it constituted "irrefutable evidence of the ability to achieve reasonable agreement on issues of common concern to the

industry and the public." *In Re The Southern New England Telephone Company*, Docket No. 94-10-02, 1995 WL 807764 (Conn.D.P.U.C. Sept. 22, 1995).[4] Thus, as the FCC itself recognized in its notice of proposed rulemaking in this matter, as of 1996, 19 states had already taken action to open local exchange markets to competition, including seven states in which competing firms had already begun to offer switched local service. *See In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 61 Fed. Reg. 18311, 18314 (1996) (App. A-81,84).

2. With knowledge of this progress toward deregulation of the local exchange market, Congress in February 1996 passed the Act to ensure that the citizens of all states shared in the benefits of competition in all sectors of the telecommunications industry.[5] The local competition provi-

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[4] App. A-140-41; A-169-86. *See also Order adopting a telecommunications price regulation and local competition plan*, 164 P.U.R. 4th 324, 1995 WL 627739 (Ala.P.S.C. Sept. 20, 1995); *Interim Order*, 167 P.U.R. 4th 349, 1995 WL 767890 (Cal.P.U.C. Dec. 20, 1995) (order of California Commission certifying 31 carriers to offer facilities-based local exchange services); *Order re: Competition for Local Exchange Service*, 163 P.U.R. 4th 155, 1995 WL 467996 (Cal.P.U.C. July 24, 1995); *Interim Opinion*, 1996 WL 223624 (Cal.P.U.C. April 10, 1996) (California Commission holding that state regulations concerning number portability are consistent with the Act); *In Re The Southern New England Telephone Company's Cost of Providing Service*, Docket No. 94-10-01, 1995 WL 509180 (Conn.D.P.U.C. June 15, 1995) (order of Connecticut commission certifying 15 companies to provide local exchange service); *In Re The Southern New England Telephone Company*, Docket No. 94-10-02, 1995 WL 807764 (Conn.D.P.U.C. Sept. 22, 1995) (approving comprehensive accord on interconnection, network unbundling and other aspects of local competition); *Order Setting Out Regulatory Structure for Competing Local Providers and Promulgating Rules*, Dkt. P-100, Sub 133, 1996 WL 593672 (N.C.U.C. Sept. 18, 1996) (North Carolina Utility Commission docket implementing North Carolina legislation on local competition.)

[5] Congress quite clearly recognized that "[s]everal States (such as New York, California, and Illinois) have taken steps to open the local networks of telephone companies." *Senate Report* at 5.

sions of the Act that are the focus of the petitions – 47 U.S.C. §§ 251-261 – are among many portions of the Act that were broadly intended to "open all telecommunications markets to competition." Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-438, S. Rep. No. 104-230, at 1 (1996), *reprinted in part in* 1996 U.S.C.C.A.N. 124 (the "*Conference Report*"); *see House Report* at 202.

While one would never know it from the petitions, Congress's avowed goal in enacting the Act was to promote competition in local telecommunications markets through "a pro-competitive, *de-regulatory* national policy framework." *Conference Report* at 1, 113 (emphasis added). Congress thus sought to "reduc[e] regulation of the telecommunications industry . . . [in order to] spur the development of new technologies and increase investment in these industries." *Senate Report* at 9; *see id.* at 10 ("By reducing regulation and barriers to competition, the bill will help ensure the future growth of these industries"). The Act, therefore, reflects Congress's "belief that more competition, rather than more regulation, will benefit all consumers," a belief that petitioners clearly do not share. *House Report* at 50.

Consistent with its deregulatory approach, Congress provided new entrants with access to the incumbent carrier's existing network and then relied principally upon private freely negotiated agreements between new entrants and incumbents to determine the precise extent and terms of that access. 47 U.S.C. §§ 251(c)(1), 252(a)(1).[6] In recognition of the fact that the local exchange market is, in the words of the FCC to this Court, the "*paradigmatic intrastate market*,"[7] and in keeping

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[6] This emphasis on private negotiation is also evident in the regulatory portions of the Act, which provide that if after *several months* of negotiation the parties are at an impasse on some or all issues, a party *may* petition a state commission to arbitrate open issues in their agreement. 47 U.S.C. § 252(b).

[7] Application to Vacate Stay, *FCC v. Iowa Utilities Bd.*, No. A-299, at 22 (Oct. 24, 1996) (emphasis added); *see* Pet. App. 15a n.16, 22a.

with the states' historical jurisdiction over, and experience with, that local market, Congress made the state utility commissions the principal governmental actors in carrying out the federal mandates. Thus, while other parts of the Act dealing with interstate telecommunications assign a paramount regulatory role to the FCC (*see, e.g.*, § 271(d)), the local competition provisions of the Act respect the traditional preeminent role of the states in regulating local telephone service and, in particular, their expertise in local rate and pricing issues.[8] *See* Pet. App. 10a-16a.

The Act prescribes broad standards that Congress intended state commissions would apply to the specific local facts and circumstances presented by the arbitrating parties. In a clear rejection of the FCC's plea for a centralized bureaucratic structure that would "more efficiently" implement the Act, Congress explicitly: allowed parties to negotiate and enter into interconnection agreements "without regard to the standards" set forth in the Act (§ 252(a)(1)); gave *state commissions* the exclusive authority to approve or reject those agreements and to "[d]etermin[e]" and "establish any rates for interconnection, services or network elements" (§ 252(c), (d)(1), (e)); allowed *state commissions* to suspend or modify provisions of the Act for mid-sized and small LECs (§ 251(f)(2)); and expressly barred the FCC from preempting state commission rules and policies on interconnection and access unless those rules "*substantially* prevent implementation of the Act" (§ 251(d)(3) (emphasis added)). Thus, Congress enacted specific provisions that expressly contemplated different, state-by-state and even company-by-company approaches to implementing the congressional mandate for competition in local telephone markets, recognizing, as petitioners refuse to do, that each local market and each of the

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[8] The legislative history confirms what the language and structure of sections 251 and 252 show—that Congress made a conscious choice to reserve exclusive control over pricing issues to state commissions. *See* S.652, 104th Cong., 1st Sess. §101(c) (1995); H.R. 1555, 104th Cong., 1st Sess. § 101(e)(1) (1995).

over 1,000 local carriers are not identical – that solutions that might work in New York City or Washington, D.C. might be disastrous in Des Moines or Fargo and that requirements that might merely annoy a large national LEC might threaten the very existence of a mid-sized or smaller LEC.

The extent of the FCC's role under this statutory scheme is clear: only "if a State Commission fails to act to carry out its responsibility under this section [252] in any proceeding or other matter under this section," may the FCC "issue an order preempting the State commission's jurisdiction of that proceeding or matter." 47 U.S.C. § 252(e)(5). In that circumstance alone may the FCC "act for the State commission." *Id.* The structure and express terms of the Act, therefore, reflect Congress's intent not to override the efforts of state commissions that were working to open their local markets to competition.

Yet, in its nearly 700-page, single-spaced First Report & Order,[9] the FCC did not see fit to live by these clear rules of the road established by Congress. Instead, the FCC consistently bridled at Congress's deregulatory, negotiation-focused framework and sought to impose its own national, "one-size-fits-all" rules over every aspect of every local telephone market in the Nation. As the Eighth Circuit recognized, the FCC sought "to preempt any state pricing regulation that would employ a different methodology" from the FCC's. Pet. App. 21a n.19. Moreover, under the FCC's "command and control" approach, state commissions would no longer implement their own regulatory policies on interconnection and access in the intrastate telephone market, even when those policies are consistent with the terms of the Act and would "not substantially prevent" achievement of the competition that Congress sought to encourage in the Act. Indeed, in a preemptive act of

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[9] *In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 61 Fed. Reg. 45476 (1996) (to be codified at 47 C.F.R. pt. 51) ("First Report & Order"). Excerpts from the First Report & Order are reprinted at Pet. App. 131a-337a.

unprecedented scope, the FCC issued a blanket order prohibiting state commissions from issuing *any* requirements or applying *any* policy that differed in any way from the FCC's own rules – in a stroke of a pen relegating state commissions to the hapless task of merely administering the FCC's rules.

3. Perhaps the most regrettable aspect of petitioners' statement of the case is their claim that the Eighth Circuit's decisions, including its earlier stay of the pricing rules, are somehow responsible for delays in the achievement of full competition in the local markets. *See, e.g.*, AT&T Pet. 12. Nothing could be further from the truth. Indeed, to the extent that there has been any undue delay in accomplishing what Congress recognized would be the difficult, complex and time-consuming task of opening all telecommunications markets to full competition,[10] such delay is attributable, in large measure, to the FCC's own misguided attempts to displa the pro-competition efforts of various states and to the well publicized preoccupation of petitioners such as AT&T, MCI and WorldCom with mergers and acquisitions among themselves, as well as their singular focus on trying to pick off only lucrative business customers of the local telephone carriers instead of investing in the facilities or services necessary to provide quality local service to *all* local customers—residential and commercial alike.[11]

Thus, in the months after Congress passed the Act many state commissions had already moved to adopt rules and

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[10] *See House Report* at 72; *see also* Statement of FCC Chairman Reed Hundt on S.1822, the Communications Act of 1994, United States Senate (Feb. 23, 1994).

[11] *See, e.g.*, J. Keller, *AT&T's New Chief Plans Bold Agenda*, Wall Street J., Dec. 3, 1997, at A3 (reporting that AT&T's new CEO is laying groundwork for possible mega-merger); M. Mills, *WorldCom Would Shift MCI's Focus*, Washington Post, Oct. 3, 1997, at A1 (quoting WorldCom's Vice Chairman; "Our strategy is not in the consumer business"); *WorldCom Makes Unsolicited $29 Billion Stock Bid For MCI*, Communication Daily, Oct. 2, 1997 (reporting on WorldCom's $29 billion bid for MCI).

policies designed to foster interconnection and access in the manner envisioned by Congress, and many parties were in the process of negotiating agreements to provide interconnection and access. *See supra* at note 4 and accompanying text. However, as the Eighth Circuit found, the adoption of the FCC's rules, and its attempt at blanket preemption of any state rules on pricing and other aspects of interconnection, had the "direct effect" of stopping pending negotiations, arbitrations and state dockets in their tracks, until the Eighth Circuit issued its stay of the pricing provisions which permitted negotiations and arbitrations to proceed. Pet. App. 10a n.9; *see Iowa Utilities Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996).

Proceed they did. Once again, while the Court will not find any mention of this in the petitions, the fact is that nearly 200 interconnection agreements had been signed by February 1997, within four months of the Eighth Circuit's stay opinion. By November 1997, just 20 months after passage of the Act, over 280 companies had signed over 1,700 interconnection agreements to provide local service of some kind in over 450 cities through the country![12] Not only have companies negotiated and signed interconnection agreements, but they have also begun to offer local telephone service under the watchful oversight of state commissions, precisely in the manner envisioned by Congress.

For example, in Connecticut – one of the first states targeted by petitioners such as AT&T, MCI and others, for local competition[13] – the state utility commission has certified over

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[12] United States Telephone Association, Competition Report (Nov. 3, 1997) (the "*USTA Competition Report*") (an excerpt from which is attached in the appendix to this brief); New Paradigm Resources Group, Inc. and Connecticut Research Group, Inc., 1997 Annual Report on Local Telecommunications Competition (8th ed. 1997).

[13] *See* K. Donnelly, *MCI Celebrates the Anniversary of Connecticut Local Telecommunications*, Business Times – New Haven, Connecticut, May 1997, at 1; S. Higgins, *AT&T Goes Local With Service Today*, New Haven Register, Mar. 1, 1997, at A1 (reporting that "AT&T chose Connecticut for its first major thrust" into local markets); B. Keveney, *TCI Service to*

(Footnote continued)

36 companies to provide local exchange service and over 200 companies to offer intra-state toll services, and it has ruled that beginning in January 1999 every residential and small business customer of respondent SNET, the incumbent local carrier, will be required to select by ballot which of the many certified carriers they wish to use for local telephone service. *In Re Investigation of The Southern New England Telephone Company*, Docket No. 94-10-05 (Conn.D.P.U.C. June 25, 1997), *as revised by*, Draft Decision (Conn.D.P.U.C. Dec. 1, 1997) (not available on West Law). Nine of the 36 certified local exchange carriers are currently offering local telephone service in Connecticut, including petitioners AT&T and MCI. Similar competition is occurring in other states' markets.[14]

REASONS FOR DENYING THE PETITIONS

Petitioners essentially advance only two reasons for granting a writ of certiorari in these cases: first, the Eighth Circuit's decision is wrong on the issues presented; and second, the Eighth Circuit's decision has permitted state utility commissions and LECs (presumably in some grand conspiracy with one another) to obstruct the movement toward local competition. As shown below and in the briefs in opposition filed by GTE and the BOCs, neither argument has merit.

The Eighth Circuit carefully considered the concerns and extensive arguments from literally hundreds of petitioners,

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Expand Next Month, Hartford Courant, Dec. 20, 1995, at A3 (reporting that TCI chose Hartford for one of its first forays into local telephone competition).

[14] For example, respondent Cincinnati Bell Telephone Co. has voluntarily negotiated and entered into, and has arbitrated, numerous interconnection agreements in Ohio, Kentucky and Indiana. Time Warner is already providing facilities–based service in Cincinnati; MCI is expected to be operational there in January; and other companies are already reselling services in that market or are authorized to do so. The Nebraska Public Service Commission has certified 13 companies as Local Competition carriers and approved 19 interconnection agreements. *See USTA Competition Report.*

respondents and intervenors on dozens of issues; it heard more than six hours of legal argument from the parties at hearings on the stay and on the merits; and, after seven months of deliberation, the court issued a detailed, thoughtful and balanced opinion that vacated some FCC rules but affirmed many others. In vacating the FCC rules, the court adhered strictly to the language and structure of the Act, as buttressed by its legislative history; by contrast to the FCC, the court did not substitute its own policy views for those enacted by Congress. As a result, the "pro-competitive, deregulatory national policy" that Congress intended when it passed the Act has been restored, and the movement toward achieving competition in local telephone service in the manner envisioned by Congress is proceeding apace. There is, therefore, no reason to grant a writ of certiorari.

I.

THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH THE LANGUAGE AND STRUCTURE OF THE ACT AND THIS COURT'S PRECEDENTS

The Eighth Circuit's decision faithfully adhered to the terms of the Act, proper principles of statutory construction and deference to administrative agencies, and this Court's precedents governing the scope of the FCC's jurisdiction over intrastate telecommunications. Contrary to petitioners' claims, the Eighth Circuit did not purport to, nor did it, announce any new legal principles or call into question the principles that this Court has applied when construing federal legislation, including the Communications Act.

The FCC and other petitioners devote much of their petitions to arguing that the Eighth Circuit supposedly erred in rejecting the FCC's assertion of jurisdiction to regulate pricing in the local telephone markets. The briefs in opposition filed by GTE and the BOCs provide this Court with the principles of statutory analysis supporting the Eighth Circuit's decision on pricing jurisdiction. The Mid-Sized LECs fully endorse and incorporate herein those briefs in opposition.

A. This brief therefore focuses on parts of the Act *other* than those specifically governing whether the FCC has jurisdiction to regulate pricing. The FCC, in the First Report & Order, wrote out of the Act three provisions expressly preserving the paramount role of state commissions over local telephone service, including non-pricing issues. *See* 47 U.S.C. §§ 251(d)(3); 251(f); 252(e)(6). The Eighth Circuit decided that the FCC overstepped its bounds in construing those parts of the Act. Although petitioners include that decision within the questions presented,[15] no petitioner squarely discusses the decision below on those statutory provisions. Petitioners only obliquely suggest that the FCC's supposed jurisdiction over these non-pricing issues provides added support to their pricing jurisdiction arguments.[16]

As shown below, the Eighth Circuit's decision regarding §§ 251(d)(3), 251(f) and 252(e)(6) was legally correct and based on sound principles of statutory interpretation. Thus, contrary to petitioners' suggestion, the Act's clear limitations on FCC authority over these non-pricing issues undermines, rather than supports, the FCC's grab for jurisdiction over pricing in local telephone markets.

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[15] All petitioners include in their questions presented both pricing and non-pricing issues. For example, in its first question presented, the FCC requests review of its statutory authority to issue rules on "the core provisions" of the local competition provisions of the Act, "including, *inter alia*, the provisions governing dialing parity and the standards for the prices" that incumbent LECs may charge. FCC Pet. I; *See* AT&T Pet. (i).

[16] Despite the FCC's reliance on the phrase "*inter alia*" in its first question presented, its reasons for granting the petition are limited to the statutory provisions in the Act governing pricing and the restrictions placed on the FCC's jurisdiction over intrastate telecommunications in § 2(b) of the Communications Act, 47 U.S.C. § 152(b). FCC Pet. 11-22. The FCC and other petitioners include only the briefest mention of the Eighth Circuit's decision on aspects of the Act other than those governing pricing jurisdiction. *See* FCC Pet. 9, 11 (citation to decision on § 251(f)), 14 n.5 (brief mention of decision on §§ 208 and 251(d)(3)). *See also* MCI Pet. 23 (brief mention of §§ 208 and 251(f)).

1. Preemption. 47 U.S.C. § 251(d)(3) is an "anti-preemption" clause entitled "Preservation of State access regulations." That provision prohibits the FCC, when either prescribing or enforcing rules to implement § 251, from preempting a state commission's regulations, orders or policies governing interconnection and access obligations in the local telephone markets unless those regulations, orders or policies are inconsistent with the requirements of § 251 or "substantially prevent implementation" of those requirements and the purposes of the local competition provisions of the Act. Nothing in § 251(d)(3) requires a state commission to conform its policies to the letter of the FCC's rules for those subject matters where the FCC *does* have jurisdiction to issue rules under § 251. The text of the statute quite clearly demonstrates Congress's intent that there is more than one way to implement the statutory requirements of § 251 without "substantially prevent[ing] implementation" of those requirements.

Nevertheless, the FCC unlawfully issued a blanket preemption order of *all* state commission regulations, orders and policies to the extent they do not implement § 251 in the precise manner as the FCC's detailed rules. *See* First Report & Order ¶¶ 101-03, 177-79 (Pet. App. 201a-202a; AT&T Lodging Materials).[17] As the FCC's then-Chairman publicly stated, the FCC's rules sought to consign state regulation of local exchange markets to the "trash can of history." Interview with Reed Hundt, *in* Telecommunications Report, Supp. at 10 (July 9, 1996). The FCC accomplished this unprecedented task with little analysis of the text of § 251(d)(3), and without developing *any* record in the rulemaking proceeding concerning whether a particular state commission's interconnection or access policy conflicted with the terms or purposes

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[17] For example, the FCC ruled that "state requirements must be consistent with the FCC's implementing regulations," and that new entrants need not "comply with a multiplicity of state variations" in interconnection requirements. First Report & Order ¶¶ 103, 177 (Pet. App. 202a; AT&T Lodging Materials).

of the Act, as § 251(d)(3) requires before that policy may be preempted.[18] In one fell swoop, therefore, the FCC sought to wipe from the books the sound, lawful policies of even those state commissions that are widely acknowledged to be in the forefront of opening up local telephone markets to competition, despite Congress's expressed desire in § 251(d)(3) to "Preserv[e] . . . State access regulations."

The Eighth Circuit overturned the FCC's blanket preemption order, holding as follows:

> Even when the FCC issues rules pursuant to its valid rulemaking authority under section 251, subsection 251(d)(3) prevents the FCC from *preempting* a state commission order that establishes access and interconnection obligations so long as the state commission order (i) is consistent with the requirements of section 251 and (ii) does not substantially prevent the implementation of the requirements of section 251 and the purposes of Part II, which consists of sections 251 through 261. This provision does not require all state commission orders to be consistent with all of the FCC's regulations promulgated under section 251. . . . It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this

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[18] Without a record concerning specific state regulatory policies, the FCC could have preempted state commissions in the present rulemaking under § 251(d)(3) only if it had found that there is *no possible* set of circumstances under which a state commission's actions that varied from the FCC's rules would satisfy the requirements of § 251(d)(3). *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580, 588-89 (1987). The FCC made no such finding, nor could it on this record. The Eighth Circuit's decision left the FCC free in appropriate circumstances and on an appropriate record to exercise its preemptive power in accordance with Congress's statutory restrictions. Pet. App. 40a & n.28.

> circumstance, subsection 251(d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.

Pet. App. 37a-38a (emphasis in original). This holding is nothing more than a straightforward application of the statutory language of § 251(d)(3), which expressly limits the preemptive scope of those FCC rules governing § 251 that are properly within its jurisdiction.

If Congress had intended in § 251(d)(3) that state commissions conforming their policies to the requirements "of this section" could do so only by strict adherence to the FCC's rules, then it would have said so. By contrast to other provisions in the same part of the Act, *see* 47 U.S.C. §§ 251(c)(4)(B), 252(c)(1), 252(e)(6), 261(c), which expressly require state commissions to adhere to FCC rules, the omission of any reference to FCC rules in § 251(d)(3) is consistent with Congress's treatment of state commission regulations elsewhere in that part of the Act. *See id.* §§ 252(d), 261(b). The FCC cannot minimize the import of Congress's omission of any reference to FCC rules in the anti-preemption provision of § 251(d)(3). *See Russello v. United States*, 464 U.S. 16, 23 (1983).[19] The FCC's reading of the statute is also

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[19] The FCC's reading of § 251(d)(3) is plainly an effort to reverse a legislative defeat. While the Senate bill had no counterpart to § 251(d)(3), the House amended H.R. 1555 on the day it passed that bill to add § 242(b)(4)(B), the precursor to § 251(d)(3). The House version was identical in every respect to the final text of § 251(d)(3), except that it required that state commission regulations, orders and policies "not substantially prevent *the [FCC] from fulfilling* the requirements of this section and the purposes of this part." 141 Cong. Rec. H8444, cols. 2-3 (daily ed. Aug. 4, 1995) (inserting new subparagraph (B) in House Commerce Committee version of § 242(b)(4), reprinted in 141 Cong. Rec. H8427, col. 1) (emphasis added). The Conference, however, changed the House's phrase – "not substantially prevent the [FCC] from fulfilling the requirements of this section and the purposes of this part" – to the phrase as now found in § 251(d)(3) – "not substantially prevent implementation of the requirements of this section and the purposes of this part." The Conference also changed the caption from "accommodation" of state access

(Footnote continued)

illogical, because if state commissions could not adopt rules or policies different from the FCC's rules, no purpose would be served by the clause in § 251(d)(3) permitting preemption only if a state commission policy that otherwise is consistent with "this section" "substantially prevent[s] implementation of the requirements of this section and the purposes of this part."[20]

In sum, the FCC's argument that only uniform, national interconnection and access rules can advance the goals of the Act rests not on the language and structure of the Act, but on the FCC's own policy view of how best to implement competition. However, whether a single set of national rules might, as a policy matter, be preferable to state-by-state rules consistent with the Act is an issue that Congress has already decided in the anti-preemption provision of § 251(d)(3).

2. Review of State Commission Decisions. 47 U.S.C. § 252(e)(6) provides for federal district court review of a state commission decision to accept or reject a negotiated or arbitrated interconnection agreement between an incumbent LEC and its competitors.[21] Congress could not have made its intent

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regulations to the more strongly-worded caption in § 251(d)(3), "preservation" of state access regulations.

[20] The FCC's blanket preemption order effectively grants the FCC exclusive jurisdiction to establish regulatory policies under § 251. Yet, it was only in § 251(e)(1) that Congress granted the FCC "exclusive" jurisdiction over certain aspects of numbering administration. That statutory reference to "exclusive" FCC jurisdiction – the only such reference in §§ 251 and 252 – would be superfluous unless Congress intended to preserve the right of state commissions to prescribe and enforce their own regulations implementing the remaining local competition provisions of the Act. *See* § 601 of the Act (uncodified) ("This Act . . . shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided . . ."). *See Conference Report* at 91.

[21] In § 252, Congress placed each state commission – not the FCC – at the center of responsibility for overseeing the efforts of private parties to enter into agreements for interconnection, purchase of network elements, and reselling of services. If parties cannot initially come to terms through voluntary negotiation, then the state commission has sole authority to

(Footnote continued)

clearer. Thus, § 252(e)(6) – entitled "Review of State commission actions," states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Congress provided only one venue, "an appropriate Federal district court," for the parties aggrieved by state commission determinations.

Despite this straightforward provision governing judicial review, the FCC ruled that the FCC itself has authority to review a state commission decision to ensure its consistency with the Act and the FCC's rules. *See* First Report & Order ¶¶ 121-29 (Pet. App. 215a-220a). The FCC did so under the guise of its authority under 47 U.S.C. § 208 to hear complaints filed against a common carrier, even though § 208 nowhere authorizes the FCC to overturn decisions of a state commission. By this action, the FCC again revealed a mistrust of state regulators not shared by Congress, by seeking the review authority over state commission decisions that Congress expressly vested in the courts.

The Eighth Circuit overturned the FCC's ruling regarding the scope of its complaint jurisdiction under § 208. The Court of Appeals held that traditional rules of statutory construction require interpreting Congress's choice of federal district court review of state commission decisions as the exclusive means of review. Pet. App. 31a-32a (citing cases). The absence of any reference in § 252 to FCC review reinforced the court's

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mediate or arbitrate disputes over remaining terms. 47 U.S.C. § 252(a), (b). Any agreement, whether reached through negotiation or arbitration, must then be submitted to the state commission for final approval before it can be implemented. *Id.* § 252(e).

conclusion in this regard. *See id.* 33a. The Court of Appeals correctly noted:

> The only grant of any review or enforcement authority to the FCC is contained in subsection 252(e)(5), and this provision authorizes the FCC to act only if a state commission fails to fulfill its duties under the Act. The FCC's expansive view of its authority under section 208 is thus contradicted by the language, structure, and design of the Act.

Id. Only after rendering its conclusion based on "the language, structure, and design of the Act," did the Court of Appeals separately and independently hold that § 2(b) of the Communications Act *also* precludes the FCC from exercising authority under § 208 to review state commission decisions on interconnection agreements, because many aspects of those agreements, such as pricing, are outside the FCC's jurisdiction. *See id.* 33a-34a.

It is particularly important for the Mid-Sized and smaller LECs that Congress's expressed desire for reduced regulatory burdens be followed. These LECs are especially vulnerable to efforts by large well-financed entrants to grind them down through multiple and duplicative regulatory proceedings. The FCC cannot ignore Congress's plainly expressed intention that parties to an interconnection agreement need only pass *one* regulatory hurdle – the state commission (with federal district court review, if necessary) – to approve their agreement. The Court of Appeals was therefore correct to reject the FCC's effort to rewrite § 252 by placing review of state commission determinations within the FCC's jurisdiction.

3. Two-percent waiver. Further underscoring Congress's confidence in the states, 47 U.S.C. § 251(f)(2) gives to state commissions alone the authority to suspend or modify the requirements of § 251(b) or (c) in certain circumstances for LECs in their state that serve fewer than two percent of the

nation's subscriber lines.[22] Those circumstances are when the LEC can demonstrate in a petition filed with the state commission that § 251(b) or (c) imposes "a requirement that is unduly economically burdensome."[23] In purporting to apply § 251(f)(2), the FCC issued Rule 405(d), which impermissibly narrows the circumstances under which Congress intended that a smaller LEC may obtain relief from the requirements of § 251. The rule does so by requiring smaller LECs to prove that § 251 requirements "would be likely to cause undue economic burden *beyond the economic burden that is typically associated with efficient competitive entry.*" 47 C.F.R. § 51.405(d) (emphasis added).

In other words, if "efficient competitive entry" – the FCC's concocted phrase – would "typically" cause the demise of the smaller LEC with a strong historical tie to its service area, due to the entry of a multinational competitor with no long-term commitment to that area, the FCC's rule would disable the state commission from even temporarily suspending or modifying any of the requirements of § 251. Yet, that scenario is precisely what Congress intended would satisfy the test of a requirement that is "unduly economically burdensome."[24]

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[22] Under § 251(f)(2), only LECs with fewer than two percent of the nation's subscriber lines in the aggregate qualify for this "2% waiver" provision. That definition excludes the BOCs and GTE, but includes all of the Mid-Sized LECs. The Mid-Sized LECs have a unique interest in the application of this provision because, unlike smaller, rural LECs that make up the vast majority of LECs in this country, many of the Mid-Sized LECs do not qualify for the automatic rural exemption of 47 U.S.C. § 251(f)(1) – a provision addressed at length in the Brief in Opposition filed by the United States Telephone Association and the Rural Telephone Coalition, which brief the Mid-Sized LECs fully endorse.

[23] The "unduly economically burdensome" test is just one of three alternative tests in § 251(f)(2) for justifying a waiver, but the FCC conceded below that its rules neither address nor purport to limit a LEC's right to resort to the other two tests.

[24] *See Senate Report* at 22 (Senate Committee, in drafting provision that became § 251(f)(2), intended that the "State shall, consistent with the protection of consumers and allowing for competition, use this authority to provide a level playing field, particularly when a company or carrier to

(Footnote continued)

That statutory phrase, and not the one made up by the FCC, governs when a state commission may tailor a requirement to the uniquely local situation, and thereby *enhance* competition by ensuring the local company's survival.

The Eighth Circuit thus vacated the FCC's rule as beyond the FCC's jurisdiction. It did so by applying the plain meaning of § 251(f)(2) as well as by reference to clear legislative history consistent with that meaning. *See* Pet. App. 28a. In enacting the two percent waiver provision, Congress recognized that not all LECs or telephone markets are the same, and that state commissions, not the FCC, had the local knowledge and experience to decide when the Mid-Sized or smaller LECs need relief from particular obligations imposed by the Act. Yet, the FCC arrogated to itself the power to restrict the state commissions' exercise of authority given by Congress, even though the statute gives the FCC *no* role to play in that purely local decision. The FCC also ignored Congress's rejection of earlier versions of § 251(f)(2) that would have created dual FCC/state commission jurisdiction over waivers. *See Senate Report* at 22, 93 (§ 251(i)); *House Report* at 74, 144 (§ 242(e)). In the bill enacted into law, Congress deleted any reference to FCC jurisdiction in § 251(f)(2) and decided instead that waiver decisions requiring a thorough knowledge of the Mid-Sized and smaller LECs should be handled only by state commissions, which are best equipped to make such determinations on a company-by-company basis.[25] The Court of Appeals' reliance on the express statutory text and clear

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which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier").

[25] Thus, on the day that the Senate passed the Act, Senator Daschle remarked: "The bill before us also recognizes the important role that must be played by Public Utilities Commissions (PUC's) in rural States. PUC's are the best entities to judge whether a given market within their State can support competition. *That's not a judgment we should make from Washington.*" 142 Cong. Rec. S709 (daily ed. Feb. 1, 1996) (emphasis added).

legislative history of § 251(f)(2), as independently supported by § 2(b) of the Communications Act, was clearly correct, and there is, therefore, no reason to disturb that ruling.

4. In the First Report & Order, the FCC paid little attention to the text of the statutory provisions just discussed. That same blindspot is apparent from the FCC's analysis of the pricing provisions of the Act. All of these provisions, both in the statutory language and when viewed as a whole, confirm that Congress did not strip regulatory authority over local telephone service from state utility commissions and hand it over to the FCC. There is, therefore, no reason for this Court to accept petitioners' invitation to grant plenary review of the Eighth Circuit's well-reasoned and balanced decision on these numerous statutory issues.

B. In its second question presented, the FCC separately takes issue with the Eighth Circuit's decision on rehearing regarding the sale of unbundled network elements. Other petitioners present the same question. The briefs in opposition filed by the BOCs and GTE fully address why this Court should not grant review of this question, and the Mid-Sized LECs adopt the arguments in those briefs.[26] This issue is of particular concern to the Mid-Sized and smaller LECs, many of whom depend heavily on the revenues earned from serving a few large companies in their service areas in order to stay in business and serve residences at the lower subsidized retail rate set by their utility commissions. If a new entrant could obtain the incumbent LEC's telephone service at the cost-based rates reserved for unbundled network elements, rather than at the wholesale rate based on the higher retail rate charged to business customers, the new entrant could "cherry pick" the important business customer base and leave the incumbent LEC only with residential customers. This type of

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[26] Similarly, the Mid-Sized LECs adopt the arguments made by the BOCs and GTE regarding why this Court should not review the question presented by petitioners concerning the FCC's "pick and choose rule."

"cream skimming" would be especially devastating to the Mid-Sized and smaller LECs.

The Eighth Circuit, therefore, correctly decided to vacate FCC Rule 315, 47 C.F.R. § 51.315. Only if new entrants incur the cost attendant to combining network elements purchased on an unbundled basis can "resale" – *i.e.*, the purchase of finished telephone service at wholesale rates – remain a "distinct and attractive option" for new entrants. Pet App. 57a. By preserving the Act's purposeful distinction between the sale of unbundled network elements at cost-based prices and the sale of an incumbent LEC's telephone services at wholesale prices, the Court of Appeals upheld Congress's intent that incumbent LECs not "lose all of the customers to whom they charge higher prices in order to fulfill their current universal service obligations." *Id.*[27]

This Court should therefore decline to review the Court of Appeals' decision on rehearing, which was based on the plain language of the Act and clear legislative intent to ensure that large global concerns cannot skim off the best customers of smaller local telephone companies. If AT&T or other new entrants wish to offer local telephone service through the purchase of unbundled network elements *at cost-based rates*, rather than by purchasing the incumbent LEC's own telephone service *at wholesale rates* and offering it for resale, the new entrant is required by the Act to design and assemble its own transmission network by selecting and purchasing from

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[27] The House specifically amended its bill going into Conference to ensure that LECs need only provide resale at "wholesale rates" rather than "at economically feasible rates to the reseller." *Compare* 141 Cong. Rec. H8426 (§ 242(a)(3)) (daily ed. Aug. 4, 1995) *with id.* at H8444, col. 2 ("resale" amendment). Representative Dingell explained that the amendment was necessary to eliminate the requirement that "local telephone companies . . . subsidize the long distance competitors," by "requir[ing] service which cost $25 to be sold to AT&T for $6; something which would have caused the necessity of subsidizing, then, AT&T at the expense of small business and local [residential] phone user, an outrageous situation." *Id.* at H8452 (also noting that Reps. Bliley and Fields worked to correct "this failure" in the bill).

the LEC the individual elements and facilities that make up an interoffice transmission network. Anything less would "require the incumbent LECs to do *all* of the work" of new entrants, in violation of the Act. Pet. App. 53a (emphasis in original).

II.

THE EIGHTH CIRCUIT'S DECISION IS NOT IMPEDING THE DEVELOPMENT OF COMPETITION IN LOCAL MARKETS

Each petition argues that certiorari is warranted because the Eighth Circuit's decision stands as an impediment to achieving competitive local telephone markets. Petitioners made identical arguments to this Court over a year ago in seeking to vacate the Eighth Circuit's stay of the pricing provisions of the First Report & Order. FCC Application to Vacate Stay, *Iowa Utilities Bd. v. FCC*, No A-299, at 27 (Oct. 24, 1996); ALTS Application to Vacate Stay, *Iowa Utilities Bd. v. FCC*, No. A-300, at 27-32 (Oct. 24, 1996).

As the facts described in the Statement show, these arguments are even less credible now than they were a year ago. Private negotiations and state commission arbitrations are working as Congress planned to open local telephone markets to competition far more rapidly than has happened with other markets or industries that have been opened to competition after decades as regulated monopolies. It should hardly be surprising that with over 1,700 interconnection agreements and numerous arbitrations, there should be, as petitioners claim, 70-100 review proceedings pending in the federal district courts. *See* AT&T Pet. 10; FCC Pet. 24. Certainly, there is no reason to believe that there would be fewer such proceedings if the Eighth Circuit had, as petitioners argue, upheld the FCC's pricing and other rules, and given the financial stakes, there is also little reason to believe that consideration of the issues presented by the petitions would likely reduce the number of contested arbitrations. Indeed, granting the petitions would only serve to create greater uncertainty in the marketplace, not less. Moreover, as decisions are rendered in

those cases and issues of concern in those local marketplaces are resolved by the local federal courts, as Congress intended, even the relatively small number of federal court review petitions that have been filed to date can be expected to diminish.

All of this progress toward competition in local markets has occurred, and can continue to occur, *without* the FCC dictating pricing methodologies to the state commissions and competing carriers and *without* the FCC preempting every state policy or rule on interconnection and access that differs from the FCC's own rules. As the Eighth Circuit found at the stay stage on the basis of the uncontroverted record before it, petitioners' claims of the calamitous consequences that would supposedly occur if private negotiations and state commission arbitrations are allowed to proceed as Congress envisioned "ignore[ ] the *empirical* success that private parties and the state commissions have had in implementing the local competition provisions of the Act," ignore the fact that this system "has initially proved to be successful," and "denigrate[ ] the proven ability of the state commissions to prevent incumbent LECs from charging excessive rates for their services." *Iowa Utilities Bd.*, 109 F.3d at 427 (emphasis added). *See* excerpt from the *USTA Competition Report* in the appendix to this brief. Respondents urge this Court to allow that "successful" implementation of Congress's plan to continue to proceed without further delay or uncertainty.

CONCLUSION

For the reasons set forth above, the petitions for a writ of certiorari should be denied.

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Dated: December 18, 1997

APPENDIX

Appendix

EXCERPT FROM UNITED STATES TELEPHONE ASSOCIATION, COMPETITION REPORT
Nov. 3, 1997

STATE	INTERCONNECTION AGREEMENTS	ARBITRATIONS
ALABAMA	92	0
ALASKA	3	0
ARIZONA	22	1
ARKANSAS	22	0
CALIFORNIA	39	0
COLORADO	13	0
CONNECTICUT	9	2
DELAWARE	20	0
DC	23	0
FLORIDA	114	0
GEORGIA	97	0
HAWAII	6	1
IDAHO	8	2
ILLINOIS	38	0
INDIANA	29	1
IOWA	8	0
KANSAS	22	1
KENTUCKY	84	1
LOUISIANA	87	0

MAINE	16	0
MARYLAND	29	0
MASSACHUSETTS	30	0
MICHIGAN	26	0
MINNESOTA	20	1
MISSISSIPPI	85	0
MISSOURI	25	0
MONTANA	8	1
NEBRASKA	9	0
NEVADA	12	1
NEW HAMPSHIRE	16	0
NEW JERSEY	32	0
NEW MEXICO	8	2
NEW YORK	27	0
NORTH CAROLINA	90	0
NORTH DAKOTA	4	1
OHIO	36	2
OKLAHOMA	29	2
OREGON	21	1
PENNSYLVANIA	42	0
PUERTO RICO	5	0
RHODE ISLAND	7	0
SOUTH CAROLINA	83	0

SOUTH DAKOTA	3	1
TENNESSEE	94	0
TEXAS	82	6
UTAH	7	3
VERMONT	9	0
VIRGINIA	42	0
VIRGIN ISLANDS	1	0
WASHINGTON	24	2
WEST VIRGINIA	14	0
WISCONSIN	25	1
WYOMING	4	1
TOTAL	1701	34